

**Docket No:** 05-0055  
**Bench Date:** 1/24/07  
**Deadline:** N/A

**MEMORANDUM**

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**TO:** The Commission

**FROM:** Terrance A. Hilliard

**DATE:** January 5, 2007

**SUBJECT:** Southwest Central Emergency Telephone System Board  
-VS-  
Du Page County Emergency Telephone System Board  
  
Dispute regarding U.S. Postal Zip Codes 60514 and 60527  
pursuant to the Wireless Emergency Telephone Safety Act  
(50 ICLS751).

**RECOMMENDATION:** Deny the Motion to Stay Enforcement of the September 13, 2006 Order.

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On September 13, 2006, the Commission entered its final order in the above-captioned proceeding determining that certain disputed wireless surcharge funds were properly payable to the Du Page County Emergency Telephone System Board ("Du Page") rather than to Southwest Central Emergency Telephone System Board ("SWC"). On October 13, 2006, SWC duly filed its application for rehearing of the Commission Order. When rehearing was denied, it filed a timely notice of appeal. On December 13, 2006, SWC filed its Motion for Stay before the Commission, invoking Supreme Court Rule 335(g). SWC alleges that in the absence of such an order, if the Appellate Court reverses the Commission, the money may no longer be available to be returned to SWC.

**Staff's Response**

Staff argues and I agree that there are several reasons why the Commission should deny this Motion. First, it is not clear the Commission has jurisdiction over the Motion at this point. Second, SWC has failed to properly allege the factual elements warranting the grant of a stay. Lastly, SWC has waited almost three months from the entry of the Commission's order to file its Motion. In the interval, Commission Staff, in compliance with the Commission order has disbursed the funds in question.

Filing of an application for rehearing, or notice of appeal, without more, does not operate as a stay of a Commission order. Section 10-113(a) of the Act provides that:

An application for rehearing shall not excuse any corporation or person from complying with and obeying any rule, regulation, order or decision or any requirement of any rule, regulation, order or decision of the Commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the Commission may by order direct.

Section 10-204(a) provides that:

The pendency of an appeal shall not of itself stay or suspend the operation of the rule, regulation, order or decision of the Commission, but during the pendency of the appeal the reviewing court may in its discretion stay or suspend, in whole or in part, the operation of the Commission's rule, regulation, order or decision.

As noted above, SWC seeks relief pursuant to Supreme Court Rule 335(g), which provides in relevant part that:

Application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. A motion for stay may be made to the Appellate Court or to a judge thereof, but the motion shall show that application has been made to the agency and denied, with the reasons, if any, given by it for denial, or that application to the agency for the relief sought was not practicable.

Under Section 10-110 of the Public Utilities Act, Commission orders "become operative" twenty days after service unless the Commission prescribes a different time. 220 ILCS 5/10-110. No special effective date for the Commission order was set in this case, so the Commission order became effective on October 5, 2006.

First, as a general rule, the filing of a timely notice of appeal vests jurisdiction in the appellate court and removes it from the tribunal below. Farwell Construction Co. v. Ticktin, 84 Ill. App. 3d 791, 806-07; 405 N.E.2d 1051, 1063; 1980 Ill. App. Lexis 2973 at 35; 39 Ill. Dec. 916 (1<sup>st</sup> Dist. 1980). Thus, it remains unclear whether a motion for stay, in order to comply with Supreme Court Rule 335(g), can be made after that party has, as in this case, filed an appeal from the Commission or other administrative agency.

Further, SWC has failed to allege elements necessary to justify a stay. Under Section 10-113(a), a party seeking a stay of a Commission order is not entitled to such relief as a matter of course. The General Assembly determined that a party seeking a

stay of a Commission order must make a sufficient evidentiary showing of the great or irreparable damage and not merely allegations of harm. See Section 10-204(b).

City of Chicago v. Commerce Comm'n, 133 Ill. App. 3d 435, 449-50; 478 N.E.2d 1369, 1380; (1<sup>st</sup> Dist., 1985) describes the showing an applicant for stay of a Commission order must make. The factors that must be demonstrated are: (1) the petitioner's likelihood of prevailing on the merits; (2) the irreparable harm petitioner will suffer if the stay is not granted; and (3) the harm to other parties which would result from the issuance of the stay.

The burden of making such a showing is very clearly with the party seeking such relief; "[i]t is incumbent upon [that party] to allege in particular terms the irreparable harm [it will suffer]." People ex. rel. Fahner v. Steel Container Corp., 102 Ill. App. 3d 369, 373; 430 N.E.2d 68, 71; 1981 Ill. App. Lexis 3702 at 8; 58 Ill. Dec. 126 (1<sup>st</sup> Dist. 1981).

The Commission has also determined that a party making a motion for stay of a Commission order must make a showing of the factors required for injunctive relief. See, e.g., Order Denying Emergency Motion for Stay of Effectiveness of Rate Order at 2 (Lexis pagination), Commonwealth Edison Company: Proposed general increase in electric rates, et al., ICC Docket Nos. 87-0427; 87-0169; 88-0189; 88-0219; 88-0253 (On Remand); 90-0169 (Consol.).

SWC does not make allegations sufficient to justify the granting of a stay. SWC asserts that it will be "severely prejudiced" if the Commission's order is not stayed, but it does not allege that it will be irreparably harmed. Because the Commission order here exclusively concerns the disbursement of disputed funds, it cannot do so. SWC also makes no allegation, conclusory or otherwise, that it is likely to succeed on the merits, nor does it address the question of hardships that Du Page might suffer in the event a stay is granted. Accordingly, its Motion for Stay is deficient as a matter of law.

Finally, SWC seeks a stay of the order for the first time some 2 ½ months after it was entered and more than two months after the order became effective. In light of the significant passage of time, and the fact that SWC had not, until December 14, 2006, sought a stay of the Commission order, the Commission Staff has disbursed the funds in question to Du Page, in the normal and ordinary course of disbursement.

Thus, issuance of a stay would be ineffectual since the effect of the Commission decision has already been carried out. Even if the Commission were to consider the merits of the Motion, denial would be proper.

## **Du Page Response**

Du Page arguments are similar to Staff's. In addition it argues that if the Commission enters a stay, SWC should be required to post a bond. Staff notes that

under Section 10-204 of the Act, a public body cannot be required to post a bond in connection with the stay of a Commission Order.

### **SWC Reply**

SWC argues that the Act does not prohibit the Commission from entering a stay and Supreme Court Rule 335 (g) requires that such a motion be filed initially with the agency that entered the order. It also contends that sufficient grounds exist for a stay and that if a stay is not entered, it may be irreparably harmed if, after reversal of the Commission Order, Du Page no longer has the money it received from the Commission. SWC also argues that contrary to Staff's argument, the Motion is not untimely because Du Page could be ordered to return the money to the Commission.

### **Analysis**

I agree with Staff's arguments. The Commission's jurisdiction subsequent to the filing of the Notice of Appeal is at best questionable. The Motion fails to allege the required elements of irreparable harm or a likelihood of success on appeal. The money has already been disbursed; therefore, SWC is not seeking to maintain the status quo. Instead, it wants the Commission to order Du Page to return the money to the Commission. The Motion filed with the Commission is a necessary prerequisite to seeking similar and perhaps more appropriate relief from the appellate court

I recommend that Southwest Central Emergency Telephone System Board's Motion be denied.

TH:fs